Supreme Court, U.S.
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No. 10-938 JAN 17 2011

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In The

Supreme Court of the United States

ANA ALVAREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question One: Does the Eleventh Circuit violate a criminal defendant's right to due process of law by employing a reasoning process at the appellate level to determine the sufficiency of the evidence by which the fact that the jury disbelieved exculpatory trial testimony of the defendant on the issue of guilty knowledge, itself, becomes substantive evidence of that defendant's guilt; where that concept conflicts with opinions of the Supreme Court and lines of cases from the Second, Sixth and Tenth Circuits and where the Government's case was otherwise legally insufficient to prove this defendant's guilt beyond a reasonable doubt?

Question Two: Did the lower appellate court misapply the harmless error statute in this criminal case, as that statute is construed by this Court, where the Government could never meet its burden to establish that the qualitative value of the exculpatory evidence contained in the excluded audio-video recording of the criminals during the commission of the actual crime would not have affected the jury's verdict?

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OPINION BELOW

The federal appellate court decision to be reviewed is published and is cited: *United States v. Mateos*, 623 F.3d 1350 (11th Cir. 2010). A copy of the original typewritten opinion from the lower federal appellate court is reproduced in the appendix to this petition at App. 1.

BASIS FOR JURISDICTION

The decision of the lower federal appellate court was filed on October 19, 2010. (App. 1) This Court has jurisdiction to review this petition pursuant to Title 18 United States Code section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall . . . be deprived of life, liberty, or property without due process of law; . . . .

Title 28 United States Code section 2111 provides:

> On the hearing of any appeal . . . in any case, the court shall give judgment after an examination of the record without regard to errors

. . . which do not affect substantial rights of the parties.

STATEMENT OF THE CASE

Four and one-half years after the crimes were alleged to have been committed, namely, in April of 2008, petitioner Ana Alvarez was indicted on five separate counts, along with six co-defendants. The first count charged under the general criminal conspiracy statute, 18 U.S.C. § 371, a conspiracy (1) to defraud the United States, namely the United States Department of Health and Human Services in its Medicare program; (2) to present false claims to the United States Department of Health and Human Services for HIV infusion therapy medication, a violation of 18 U.S.C. § 287; and (3) to knowingly pay cash kickbacks for Medicare services, a violation of 42 U.S.C. § 1320a-7b(b)(2). That conspiracy was alleged to have occurred from April 2003 through November 2003. The second count charged a conspiracy to commit health care fraud, a violation of 18 U.S.C. §§ 1347 and 1349. As was true with the first count, defendant Alvarez was charged along with the same six other individuals. That conspiracy was alleged to have occurred over the same time span as the first conspiracy count, i.e., from April 2003 through November 2003. Counts Three, Four and Five charged defendant Alvarez, along with three of those co-defendants, with submitting three separate false claims for the same medicine, each a separate violation of 18 U.S.C. § 287.

All of those latter three crimes were committed on August 11, 2003 and each involved a different Medicare beneficiary.

At trial, the Government established that Saint Jude Rehabilitation Center clinic was used to commit health care fraud. Defendant Alvarez, who ultimately was employed to work at that clinic, defended on the basis that defendant Ana Alvarez did not knowingly join in any criminal scheme and did not criminally agree with the perpetrators to further their corrupt enterprise.

Aisa Perera and Mariela Rodriguez[1] opened a medical clinic that was incorporated as Saint Jude Rehabilitation Center (hereafter, "St. Jude"). Rodriguez convinced an old retired doctor, Orestes Alvarez-Jacinto, to work at that clinic.

Perera sought out Rita Campos, who had an existing billing company and who was versed in medical billing. Campos told Perera that three Benitez brothers could use Perera's clinic, St. Jude, to "treat" AIDS patients, who were also Medicare beneficiaries. At Campos's office with Campos present, Perera talked with Luis Benitez regarding the running of an HIV clinic. Benitez already had a clinic downstairs from Campos's billing company. Benitez told Perera how his scam worked. Benitez stated that he, Benitez,

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[1] Perera, Rodriguez and Dr. McKenzie pled guilty and testified for the Government at this trial.

would provide the money to open up St. Jude and that he, Benitez, would help set up that clinic. Moreover, Benitez said that Benitez would bring "key employees," i.e., nurses, to make that business run. Benitez also stated that he, Benitez, would provide all of the supplies, including the medicine. Finally, Benitez told Perera that he, Benitez, would have "a special doctor," Dr. Thomas McKenzie, who would train the clinic personnel in how to document the files in order that Medicare would never refuse to pay the bills submitted to it.

Benitez insisted that Campos would do the billing for this clinic, because Campos knew how Medicare paid. Finally, Benitez, himself, would provide the patients and would also provide transportation for those patients to be taken to this clinic. Benitez stated to Perera that part of his scheme involved paying the patients kickbacks and that his nurses would be paying those patients. In exchange for handing Perera this plan, paying for the set-up and, in essence, making sure that it ran as a functioning scheme, Benitez demanded sixty per cent (60%) of the profits after expenses. The remaining profit was to be split between Perera, Rodriguez and another person named Valon. That latter person, Valon, was to transport the patients to this clinic and act as a supervisor to insure that the patients Benitez was providing were quiet and got paid.

After Perera received this too-good-to-be-true offer from Benitez, Perera approached Rodriguez. Rodriguez agreed to this offer. At the time that this

particular scheme was presented to both Perera and Rodriguez, it was apparent that a doctor for HIV treatment was needed. Rodriguez approached Dr. Orestes Alvarez-Jacinto to work at St. Jude to treat HIV patients as opposed to his initially-intended work as a gynecologist. Perera and Rodriguez told Dr. Orestes Alvarez-Jacinto that they would reactivate his Medicare provider number, but that they intended the clinic to treat HIV patients. Dr. Orestes Alvarez-Jacinto stated that he, Dr. Orestes Alvarez-Jacinto, had no experience treating HIV patients. "We [i.e., Rodriguez and Perera] told him that he was going to be trained from somebody who had experience and Orestes said that, if he was going to be taught, he accepted the job." Dr. Alvarez-Jacinto was needed most of all by the criminals to permit St. Jude to use that doctor's Medicare provider number. St. Jude, itself, did not have a provider number and could not bill Medicare without one. By using Dr. Alvarez-Jacinto's Medicare provider number, Medicare would be sending checks to St. Jude in the name of Dr. Alvarez-Jacinto.

Initially, Dr. Orestes Alvarez-Jacinto agreed to work at Rodriguez's intended facility before Benitez broached the scheme that led to this prosecution. On the same day that Dr. Orestes Alvarez-Jacinto agreed to see HIV patients, Dr. Alvarez-Jacinto asked them, "do you think my daughter would be able to work with us if it's needed and we [i.e., Perera and Rodriguez] said 'not right now,' because we weren't sure whether it was going to be able to work or not and

[Perera and Rodriguez eventually] spoke to the Benitezes about that." Dr. Orestes Alvarez-Jacinto "said she's not doing very well and if we can bring her aboard, just let me [i.e., Dr. Orestes Alvarez-Jacinto] know and I'll talk to her."

Dr. Ana Alvarez was not recruited by the Benitez brothers to work at St. Jude. Rather, to use a sports analogy, Dr. Ana Alvarez was a "walk on," who came to St. Jude only because her father knew she needed work.

Perera and Rodriguez incorporated St. Jude in April, 2003 and opened the St. Jude clinic by early July of 2003. As was part of the fraudulent scheme from the beginning, all persons treated there were HIV positive patients who were Medicare beneficiaries. Benitez provided the startup money, provided Rho D (WinRho) medicine, and sent his nurses.

Perera's responsibility was to do all of the paperwork, do all administrative work, order medicine and order medical supplies. Perera established a bank account for St. Jude and ultimately made the signatories on that account, Perera, herself, Rodriguez, Dr. Orestes Alvarez-Jacinto, and one other person. Dr. Orestes Alvarez-Jacinto had to be a signatory on this account, because Medicare was directly depositing payment for treatment into this bank account. Dr. Ana Alvarez was made a signatory later on. Payments to Dr. Ana Alvarez were sent on behalf of Medicare by check. Payments made by check were deposited only by Perera, herself, or Rodriguez. Dr.

Ana Alvarez never signed those checks in order for them to be deposited in the St. Jude business bank account. Perera never showed to Dr. Ana Alvarez those checks written to Dr. Ana Alvarez as Medicare payments. Perera, herself, made all payments that St. Jude was required to make. It was Perera, herself, who wrote checks to Campos's billing company to pay for the Medicare bills that Campos prepared and the checks written to Dr. McKenzie. Perera, herself, also wrote checks to be cashed for money that was used to pay kickbacks to the clinic's patients. Those checks were written to Perera's husband and brother-in-law, who would bring the kickback money. Perera received that kickback money and gave it to the nurses, while in Perera's office. Kickback payments were made by the nurses to patients inside the infusion room. Dr. Orestes Alvarez-Jacinto and Dr. Ana Alvarez never paid the patients. Perera, herself, controlled the books of St. Jude, subject to accounting to the Benitez brothers for the amount of money being taken in; but Campos did the billing.

Dr. McKenzie came to St. Jude around the time that this clinic opened. Everyone at the clinic, including Perera, called him "doctor," although this real doctor actually lacked a state license to practice medicine. Initially, Dr. McKenzie met with Dr. Orestes Alvarez-Jacinto and a medical assistant to explain how they should document their work. Perera never dealt with the medical part of this criminal venture.

Dr. McKenzie actually was a doctor, who received his medical degree in Guatemala and developed a

specialty as a gastric surgeon before coming to the United States. Prior to coming to St. Jude, Dr. McKenzie developed a background in dealing with HIV infusion treatment by working at other eventually-notorious Benitez clinics and had several years of on-the-job experience with that infectious disease. Dr. McKenzie instructed that Dr. Alvarez-Jacinto should document whether the patient had some form of bleeding disorder. Dr. McKenzie told Dr. Orestes Alvarez-Jacinto and a medical assistant that Rho D infusions were used to treat ITP and that lab results would be necessary. However, Dr. McKenzie did not tell those two that the patients were likely to have ITP. ITP is the acronym for idiopathic thrombocytopenic purpura, which simply stated, is a condition of low blood platelets.

Dr. McKenzie returned to St. Jude on its first day of operation. At that time, Dr. Ana Alvarez was there. Dr. McKenzie knew that Dr. Ana Alvarez was not an infectious disease doctor. Dr. McKenzie had been presented to Dr. Ana Alvarez as a medical expert in HIV treatment. **Dr. McKenzie told Dr. Ana Alvarez** that all of the patients **would be receiving** WinRho treatment and stated that ITP and all bleeding sites had to be documented. Dr. McKenzie testified that "**the patients**[2] **pretty much came in explaining that they had bleeding.**" According to Dr. McKenzie, a diagnosis of ITP **or a bleeding disorder** was

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[2] Those patients were procured by the Benitez brothers.

necessary to justify WinRho treatment. Dr. McKenzie provided a set dosage of WinRho that was to be given, but did not do much explaining to Dr. Alvarez-Jacinto or Dr. Ana Alvarez because the infusions were to be given in the infusion room. Dr. McKenzie was not familiar with the Medicare billing process done by St. Jude.

"Superbills", i.e., the bills sent to Medicare, were filled out by the doctors and then sent to Campos's billing company. The patients and either Dr. Alvarez-Jacinto or Dr. Ana Alvarez had to sign those bills. The key to this billing fraud was the numeric diagnostic code **that Campos put on each bill**. The numeric diagnostic code that Campos inserted was for a medical condition called Thrombocytopenia. **The clinic, itself, did not have the code book that contained the billing codes**. The matter of the codes was Campos's specialty.

Simply stated, payment in this case was predicated **solely on the bill submitted, not on any supporting documentation that remained in the patient files at St. Jude**. Restated, payment by Medicare did not depend on anything other than that (1) a patient, who had a Medicare patient number, signed this bill and (2) a doctor, who had a Medicare provider number, signed that bill. Payment by Medicare was based on an assumption of honesty. Consequently, the Government established that this case really was about the "superbills" sent to and paid by Medicare.

A certified medical expert in HIV-AIDS treatment established for the Government that any medical expert **knowledgeable** in HIV-AIDS treatment and any trained criminal investigator could review the St. Jude patient files and readily discover from those files that these patients did not qualify for the costly WinRho treatments that Campos was billing Medicare. Simply stated, the documentation created by Dr. Alvarez-Jacinto and Dr. Ana Alvarez, including the tests ordered and results inserted in patient files, actually was useless in hiding the billing fraud. To the contrary, what the real doctors were instructed by McKenzie to do was a charade. The medicine that was being billed to Medicare should not be used to treat the patients, who had the blood platelet levels that appeared in the lab test results both ordered by Dr. Alvarez-Jacinto and Dr. Ana Alvarez and placed in those files by those two doctors. Nevertheless, every patient file contained a numerically-coded superbill that billed Medicare for the expensive medicine purportedly used for treatment.

The Government introduced numerous patient files as a composite exhibit. Those files, if read, contain much evidence exculpatory to **Dr. Ana Alvarez**. These patient files contained handwriting by Dr. McKenzie, Dr. Orestes Alvarez-Jacinto and a medical assistant, in addition to Dr. Ana Alvarez. The Government did not separate out what documents were **only written by Dr. Ana Alvarez**. Each patient's file contains (1) medical aspects, i.e., charts and lab reports, and (2) billing documents. More medical tests

and medical procedures were administered by Dr. Ana Alvarez beyond merely authorizing WinRho treatment. There are numerous superbills in those patient files. But, the only ones that are of significance are **those signed by Dr. Ana Alvarez**. For example, in the file of patient Joel Rapoport, Dr. Alvarez sent a letter **to Medicare** dated October 29, 2003. Nowhere in that list of ailments did Dr. Ana Alvarez type either "ITP" or "Thrombocytopenia." Far more medical treatment was provided than just WinRho treatment. The same is true of the letter **to Medicare** sent on October 29, 2003 by Dr. Ana Alvarez regarding patient Sheila Petit. The superbills for Philip Audette, who testified at this trial, were not signed by Dr. Ana Alvarez during the months of July and August. Dr. Ana Alvarez only signed an Audette superbill from September 17 to October 20, 2003 – after Dr. Ana Alvarez was meeting with the F.B.I. All other Audette superbills were signed by someone else. **All** of those bills for patient Audette that **Dr. Ana Alvarez** signed had the typed-in diagnostic code "**287.3**." That number was the diagnostic code assigned for the medical condition "Primary Thrombocytopenia." **Nowhere** on those superbills is there any diagnosis with the actual words "ITP" or "Thrombocytopenia."

A special agent with the Office of the Inspector General for the United States Department of Health and Human Services determined that only 610 vials of WinRho had been purchased by St. Jude, but that 18,604 vials would have been required to fill all the prescriptions indicated based on the prescription and

infusion sheets in all the patients files. Moreover, the Government introduced **no** proof that **any** WinRho drug had actually been placed in the infusion pouches by the Benitez nurses.

Dr. Orestes Alvarez-Jacinto and Dr. Ana Alvarez were only paid weekly salary checks during the entire time that they were employed by St. Jude. The clinic technically closed by Perera and Rodriguez after November 17, 2003, when both Dr. Orestes Alvarez-Jacinto and Dr. Ana Alvarez resigned. When the Benitez brothers were told that these two doctors had resigned, the Benitez brothers asked Perera to offer those doctors a salary increase – not a percentage of the illegal proceeds – to continue working there so that their medical provider numbers could still be used by St. Jude to bill Medicare. The Benitez brothers received 60% of the profits from this scheme. Perera and Rodriguez **each** made approximately one and one-half million ($1,500,000.00) dollars from this criminal venture. Dr. McKenzie earned approximately one million three-hundred thousand ($1,300,000.00) dollars working for the Benitez brothers. Campos received 5% of every Medicare payment, as a result of her billing service for this fraudulent scheme. Perera's husband and brother-in-law were paid 10% of the amounts of the checks they cashed to obtain kickback cash for the patients.

Neither Dr. Alvarez-Jacinto nor Dr. Ana Alvarez agreed to return to work at St. Jude for a higher salary. Nevertheless, after November 17, 2003, Perera was still depositing in the St. Jude business account

checks that were written to Dr. Ana Alvarez as Medicare payments.

There was no direct testimony from any of the Government witnesses that Dr. Ana Alvarez had actual knowledge of this fraudulent billing scheme. As a conspiratorial leader of the St. Jude fraud, Perera's only testimony suggesting that Dr. Ana Alvarez was criminally involved in that conspiracy was the answer to a general question regarding **all** persons charged by the Government as to whether "they knew that the scheme at St. Jude Rehab Center was fraudulent." Perera answered: "Yes, everybody knew exactly what was going on." Other than that statement, Perera testified to nothing showing that Perera had personal knowledge of the actual knowledge that Dr. Ana Alvarez possessed. Rodriguez **never** testified that Dr. Ana Alvarez was in on this fraudulent billing scheme. Dr. McKenzie was asked point blank, "Did you ever say to Dr. Ana Alvarez, we are committing fraud?" and Dr. McKenzie answered very clearly, "**No**." Later, Dr. McKenzie was asked: "Now, I want to be clear about this; You never had any conversation with Dr. Ana Alvarez about committing fraud, correct?" A second time, Dr. McKenzie answered, "**That's correct**." A third time, Dr. McKenzie was asked, "You never said to Dr. Ana Alvarez, you know we're committing fraud here, right?" Dr. McKenzie answered, "**That's correct**."

An F.B.I. agent testified that Dr. Ana Alvarez had her first full two-hour meeting with F.B.I. agents on **August 27, 2003** at a place other than St. Jude. That

meeting was at Dr. Ana Alvarez's request. Dr. Ana Alvarez informed the F.B.I. that the patients "were complaining of bleeding disorders" and that "[o]nly one patient would be considered thrombocytopenic." Again on September 4, 2003, Dr. Ana Alvarez met with the F.B.I. agent and a special agent from the Office of the Inspector General for the United States Department of Health and Human Services. Dr. Alvarez told those government agents that billing for Thrombocytopenia **was not appropriate**. The F.B.I. agent met again with Dr. Ana Alvarez at the end of October 2003.

On November 14, 2003, Dr. Ana Alvarez told the F.B.I. that she was quitting St. Jude. At the F.B.I.'s request and because the F.B.I. wanted "to see if we could gather any evidence of criminal activity," she delayed her resignation until November 17, 2003 to permit the F.B.I. to use her to surreptitiously orally and visually record on tape her meeting at St. Jude when she insisted on quitting. The F.B.I. obtained its desired audio-video recording.

Those meetings with the F.B.I. were voluntary on Dr. Ana Alvarez's part. Dr. Ana Alvarez met with the F.B.I. because Dr. Alvarez "had some concerns" about what was going on at St. Jude. Dr. Ana Alvarez provided the F.B.I. with a lot of information. The F.B.I. agent never testified that Dr. Ana Alvarez requested immunity or any benefit for assisting the F.B.I. Indeed, Dr. Ana Alvarez never stated that Dr. Ana Alvarez knew that there was fraudulent billing going on at St. Jude. Nor did the F.B.I. tell Dr. Ana

Alvarez to stop authorizing treatment with WinRho medication.

Dr. Ana Alvarez testified in her own defense from memory about what happened in the year 2003, after having been indicted about five years after the critical time period. That testimony was consistent with the testimony of the Government witnesses and the documentary evidence that could be attributed to Dr. Ana Alvarez, herself. During her testimony, for example, Dr. Ana Alvarez established from one of the patient files for Ronald Green that **on August 20, 2003, Dr. Ana Alvarez rejected infusion therapy for Mr. Green**, because his lab result established that he was not HIV positive. Nevertheless, his file showed that the superbill for that visit contained the diagnosis "042-287.3," the numeric code that authorized WinRho treatment. Dr. Alvarez crossed out WinRho treatment on that superbill.

During her testimony, Dr. Ana Alvarez denied having actual knowledge of the fraudulent billing scheme that she aided by signing the superbills for her patients. During her testimony, Dr. Ana Alvarez made no admission of guilty knowledge. Dr. Alvarez testified that she followed the procedure dictated by Dr. McKenzie because she lacked knowledge of HIV treatment and because Dr. McKenzie was presented to her as an expert in this area.

Practically, this case turned on whether the Government proved that defendant Ana Alvarez was guilty prior to August 27, 2003, when Dr. Alvarez

began meeting with the F.B.I. That was a two-month period covering July and August of 2003.[3]

The Government's entire case against Dr. Ana Alvarez was based only on circumstantial evidence, at best, requiring the jury to infer that Dr. Ana Alvarez **had to have known** what the criminals were doing criminally. None of the organizers and prime movers in this criminal episode ever testified that Dr. Alvarez was told of this fraudulent scheme and helped make it a success while Dr. Ana Alvarez was in possession of the knowledge of what was criminally being done. There was no proof that Dr. Alvarez agreed with Perera, Rodriguez, McKenzie, Campos or any of the Benitez brothers to participate in fraudulent billing of Medicare.

The medical records maintained at St. Jude, which were supposedly maintained to perpetrate this Medicare fraud, had **no significance** in perpetration of this fraud. The Government's own evidence established that (1) this fraud was predicated on use of billing codes and that Dr. Ana Alvarez **never** was involved in inserting the key numeric code on those superbills; (2) there was **no** evidence that Dr. Ana Alvarez knew what this critical numeric code (287.3), itself, meant to Medicare;[4] (3) payments were made

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[3] Noted earlier, three of the counts in her indictment concerned bills submitted to Medicare on August 11, 2003 – prior to Dr. Ana Alvarez's first meeting with the F.B.I.

[4] This is just one of several inferences upon inferences that the Government utilized to obtain a conviction. The Government

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without anyone from the Government ever inspecting the underlying medical files; (4) the instructions given by Dr. McKenzie were **wrong** and so wrong that any actual expert in HIV medications easily could see that the medical documentation did not support the prescription of WinRho, because the key to proper administration of WinRho is not bleeding, but rather low blood platelet counts;[5] (5) the "patients" actually

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asked the jury **to infer** that Dr. Alvarez knew the numeric billing code for WinRho treatment **and then infer** that because Dr. Alvarez knew that code and **further infer** that because Dr. Alvarez knew that WinRho was not medically necessary and **even further infer** that because Dr. Ana Alvarez knew that actual WinRho infusions were not being made, that Dr. Ana Alvarez was involved in this fraudulent scheme up to her eyeballs.

This is especially revealing. Medicare made payment without ever seeing any prescription for WinRho. Payment was based entirely on the numeric code in the superbill. What Dr. Ana Alvarez did at St. Jude Clinic and what Dr. Ana Alvarez prescribed were only useful as a justification by the crooks to have Dr. Ana Alvarez voluntarily sign the superbills containing a numeric code the meaning of which Dr. Alvarez did not know and by which the crooks were receiving Medicare checks for which St. Jude was not lawfully entitled.

[5] This is a thinking person's case, not one to be decided by gut feeling, smoke and mirrors, or gut instinct. An examination of the patient records in Government's Exhibit 20, the composite exhibit of all patient files introduced into evidence at this trial, which were written by or signed by **Dr. Ana Alvarez** and especially the diagnosis letters submitted to Medicare and signed by **Dr. Ana Alvarez**, would allow anyone to discover that Dr. Ana Alvarez **did not** falsely diagnose a patient as having ITP (low blood platelet count). Any doctor who knew that the numeric code **287.3** was for WinRho and knew what WinRho was properly used for would have falsified the letters and charts by writing ITP. If a doctor was in on the fraud and creating false

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never were being infused with the WinRho that Dr. Alvarez and others had prescribed under the erroneous belief that those infusions were appropriate and actually being administered;[6] and, finally, (6) the

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records, why not falsely write ITP? Common sense reveals that Dr. Ana Alvarez **was not** in on this fraudulent scheme and **was not** a participant with guilty knowledge of what was being done by the actual crooks.

The letters sent to Medicare and signed by Dr. Ana Alvarez do not list ITP. If Dr. Alvarez was in on this fraudulent scheme and seeking to justify WinRho infusions, the way to do so would have been to falsely write a diagnosis of ITP **on the letters** being sent to Medicare. Those were letters actually mailed to Medicare. Those letters to Medicare, not the notations on patient records that were kept in patient files, tell whether Dr. Ana Alvarez was knowledgeable about the criminal aspect of this clinic's billing. Dr. Ana Alvarez's letters **do not** justify payment for the numeric code 287.3 contained in the bills also sent to Medicare.

Finally, it is irrational to place and keep lab reports in the patient files that establish that the blood platelet counts were too high to justify treatment by use of WinRho. That guarantees prosecution once those files are reviewed by the Government. However, if a doctor did not know that WinRho should be used only when blood platelet count was significantly low, that doctor would have no reason to not place the lab results in a patient's file. Dr. Alvarez left those lab reports in that file. The only rational inference is that Dr. Ana Alvarez **did not know** that WinRho should not have been prescribed.

[6] From a criminal's perspective, this makes absolute sense. Because the crooks were billing for unneeded WinRho infusions and because those crooks were never actually infusing the patient with that drug, those crooks were making a 100% profit with minimal cost outlay for an expensive drug that should not be given to those patients anyway. All that was needed was to have enough of the actual drug visible at the clinic in the event that

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patient documents introduced by the Government that were written by Dr. Alvarez, herself, – as opposed to anyone else – were **inconsistent** with those of a doctor trying to perpetrate the fraud which the Government proved. Restated, the Government's proof appeared full of sound and fury, but did not prove beyond a reasonable doubt that, prior to dealing with the F.B.I., Dr. Alvarez participated in this medicare fraud with **guilty knowledge** of what was being criminally done through fraudulent **billing**.

The Government attacked the credibility of Dr. Ana Alvarez on cross-examination, because Dr. Alvarez denied ever looking up the drug WinRho in a book entitled "Physician's Desk Reference" and known by its acronym "PDR." As noted above, there is nothing unusual, let alone wrong, with relying on Dr. McKenzie's purported expertise. Just as important, the fact that Dr. Ana Alvarez did not check the PDR is also not evidence of criminal behavior on Dr. Alvarez's part. At worst, relying on another expert's instructions may ultimately prove to be poor medical practice, but the failure to check the PDR, itself, does not create guilty knowledge as to what was being done criminally by others. Indeed, the absence of drug research in the PDR by Dr. Ana Alvarez reinforces the fact that there was a lack of guilty knowledge, rather than establishes it.[7] The closest analogy to the legal

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anyone came to inspect St. Jude in order to give St. Jude a facade of legitimacy.

[7] Government focus on whether Dr. Ana Alvarez read the PDR regarding the medication WinRho is a perfect example of

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profession is the failure of a lawyer to Shepardize an appellate opinion that his superior tells him to rely on. In this context, that deficient medical practice is not criminal conduct.

Dr. Ana Alvarez was convicted by her jury and sentenced to a lengthy term of imprisonment.

REASONS FOR GRANTING THIS PETITION

Question One

The appellate level issue of whether the evidence is legally sufficient to sustain a conviction is, arguably, the most important issue that an appellate court can address in a criminal case. Almost all other legal principles concerning a trial are focused on fostering the concept that the innocent should go free and the guilty should be punished.

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the forbidden inference upon inference approach used to convict Dr. Ana Alvarez. If Dr. Alvarez read the PDR for WinRho, then Dr. Alvarez would have known that WinRho should never have been prescribed. If Dr. Ana Alvarez prescribed WinRho knowing that it should never have been prescribed, that situation would establish that Dr. Ana Alvarez was a knowing participant in this criminal endeavor. Here, however, the Government asked the jury to **infer** that Dr. Alvarez knew that WinRho was not medically prescribable to her patients **and then infer** that by writing a WinRho prescription Dr. Alvarez had to know that she was fraudulently billing Medicare for medically unnecessary infusions of WinRho.

In theory, Supreme Court law protects a person, such as Dr. Ana Alvarez, who is involved in a factual situation such as that presented at her trial. Merely engaging in conduct that serves to help a criminal scheme succeed is not enough to make a person criminally liable for a conspiracy. Without personal knowledge of the criminal scheme, the criminal intent needed to convict for conspiracy to commit a particular crime cannot exist. To establish the required level of intent, the evidence of actual knowledge must be clear, not equivocal, because the charge of conspiracy **cannot be made out by piling inference upon inference**. *Ingram v. United States*, 360 U.S. 672 (1959); *United States v. Falcone*, 311 U.S. 205 (1940).

In order for Dr. Ana Alvarez to be convicted of conspiracy to commit health care fraud, the government must present sufficient evidence that Dr. Ana Alvarez, herself, knew of the plan to defraud Medicare and that Dr. Ana Alvarez, herself, had specific intent to assist the criminals to defraud Medicare.

The Government's case against defendant Ana Alvarez was totally circumstantial regarding whether that defendant had guilty knowledge of the fraudulent billing. In its answer brief, the Government relied on Eleventh Circuit precedent to argue that, because Dr. Ana Alvarez testified that she lacked guilty knowledge of the criminal conspiracy, the jury's conviction, itself, established that guilty knowledge.

To reject Dr. Alvarez's argument that the evidence was legally insufficient to convict Dr. Ana Alvarez, the lower appellate court utilized Eleventh Circuit precedent, which the Government urged in its answer brief. This precedent was *United States v. Brown*, 53 F.3d 312 at 314 (11th Cir. 2005). *Brown* reasoned that, if a defendant testified and, thereafter, the jury convicted after hearing that testimony, the jury's finding of guilt turned a defendant's denial of guilty knowledge into affirmative evidence that "the opposite of the defendant's testimony is true." At the appellate level, that jury disbelief of the defendant's testimony "may be considered as **substantive evidence** of the defendant's guilt." As the Government argued in its brief using that Circuit's precedent, "a defendant's testimony denying guilt may establish, **by itself**, elements of the offense." In reality, at the appellate level the Eleventh Circuit uses a reasoning process in evaluating the legal sufficiency of the Government's case where a defendant's **exculpatory** testimony can fill in lacuna in the Government's proof.

Only the Eighth Circuit may have adopted this Eleventh Circuit reasoning. *United States v. Reed*, 297 F.3d 787 (8th Cir. 2002).

In her reply brief, Dr. Alvarez expressly argued that use of this Eleventh Circuit precedent would deny defendant Alvarez due process of law on the facts of this case. Although realizing that the Eleventh Circuit's *Brown* opinion was binding precedent in the Eleventh Circuit, Dr. Alvarez argued in her reply brief that the contrary, but correct, analysis was

contained *United States v. Morrison*, 220 Fed. Appx. 389 at 397-398 (6th Cir. 2007) and *United States v. Rahseparian*, 231 F.3d 1257 (10th Cir. 2000).

The core premise of the lower court's opinion relying on *United States v. Brown*, 53 F.3d 312 at 314 (11th Cir. 2005) conflicts with this Court's opinion in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 at 512 (1984), where this Court addressed sufficiency of the evidence to prove by clear and convincing evidence an element of a civil cause of action and stated: "When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion."

That core premise, which is contained in *Brown* and was used to destroy Dr. Alvarez's argument that the Government's evidence was legally insufficient to convict Dr. Alvarez, also conflicts with this Court's opinion in *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U.S. 573 at 576 (1951), where this Court addressed sufficiency of the evidence to prove by a preponderance of the evidence an element of a civil cause of action and stated in pertinent part: "True, it is the jury's function to credit all or part of the testimony. But disbelief of the engineer's testimony would not supply a want of proof. *Bunt v. Sierra Butte Gold Mng. Co.*, 138 U.S. 483, 485. Nor would the possibility alone that the jury might disbelieve the engineer's version make the case submissible to it."

Finally, this core premise of Eleventh Circuit precedent conflicts with lines of cases in the Second, Sixth and Tenth Circuits[8] exemplified by *United States v. Ogando*, 547 F.3d 102 (2d Cir. 2008); *United States v. Nusraty*, 867 F.2d 759 at 765 (2d Cir. 1989); *United States v. Morrison*, 220 Fed. Appx. 389 (6th Cir. 2007); *United States v. McDougald*, 990 F.2d 259 (6th Cir. 1993); *United States v. Woody*, 250 Fed. Appx. 867 at 876 (10th Cir. 2007); *United States v. Rahseparian*, 231 F.3d 1257 (10th Cir. 2000).

If the Eleventh Circuit's reasoning cannot be employed to meet the burdens of proof in civil cases that require proof by a preponderance of the evidence or clear and convincing evidence, the Eleventh Circuit cannot employ that rejected reasoning process at the appellate level to sustain a criminal conviction that the Due Process Clause requires be proved by evidence beyond a reasonable doubt.

The seductive sophistry utilized by the Eleventh Circuit results in a denial of due process at the appellate level, by employing legal reasoning that infringes on the due process right to be convicted upon evidence that establishes guilt beyond a reasonable doubt without shifting the burden of proof from the Government to a criminal defendant. This Eleventh Circuit precedent, if left standing, will continue to

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[8] *Brown*, *supra*, was decided with a dissent, about which the majority stated: "As we understand the core of the dissent, our colleague, in effect, rejects the idea that disbelieved testimony of a criminal defendant is substantive evidence to be counted toward guilt." *Id.* at 314 n. 4.

promote miscarriages of justice. It strikes at the heart of our concept of criminal law, which applies the highest burden of proof upon the Government because of what is at stake. This case presents a significant legal issue that warrants this Court in resolving the conflict between the Eleventh Circuit and opinions of this Court, as well as, opinions of the Second, Sixth and Tenth Circuits.

Question Two

The lower appellate court seriously misapplied the federal harmless error statute, 28 U.S.C. § 2111, to the pertinent facts of this case, by disregarding precedent of this Court construing that statute. As with any statute, it must be properly applied as interpreted by this Court. Improper use of the harmless error statute, especially in federal criminal cases, is a threat to the neutral administration of justice.

The prior federal harmless error statute, which has the materially identical wording of the present Title 28 United States Code section 2111, was construed by this Court in *Kotteakos v. United States*, 328 U.S. 750 at 764-765 (1946), in the following manner:

> If, when all is said and done, the conviction is sure that the error **did not influence** the jury, or has but very slight effect, the verdict and the judgment should stand,. . . . But if one cannot say, **with fair assurance** after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is **impossible**

> to conclude that substantial rights were not affected. **The inquiry cannot be merely whether there was enough to support the result**, apart from the phase affected by the error. **It is rather**, even so, **whether the error itself had substantial influence**. If so, or if one is left in grave doubt, the conviction cannot stand.

"Harmless-error review looks, . . . , to the basis on which 'the jury *actually rested* its verdict.' [citation omitted]. The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict actually rendered would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275 at 279 (1993).

There is an important consideration that was overlooked by the lower court in this case. In a criminal case, the burden is upon the Government "to explain why an error should not upset the trial court's determination. And the fact that the Government must prove its case beyond a reasonable doubt justifies a rule that makes it more difficult for the reviewing court to find that an error did not affect the outcome of the case." *Shinseki v. Sanders*, 561 U.S. ___, 129 S. Ct. 1696 at 1706 (2009)

On the very last day that Dr. Ana Alvarez was to work at St. Jude, the F.B.I. agent in charge of this investigation had Dr. Ana Alvarez surreptitiously make an audio-video recording of the meeting with Perera and Rodriguez, the two persons who ran St. Jude and were critical to daily perpetration of

this Medicare fraudulent scheme. That F.B.I. agent testified that in addition to seeking incriminating evidence against Perera and Rodriguez, this agent also secretly wanted to obtain evidence about defendant Ana Alvarez as to whether she was "knowingly involved." The record is clear that neither Perera nor Rodriguez had any knowledge of this criminal investigation on the date that this recording was obtained. There was no issue of the reliability of this DVD, which was authenticated by the F.B.I. agent and kept in F.B.I. custody since immediately after Ana Alvarez exited St. Jude with that recording.[9]

What that video shows of the visual reaction of Perera, and to an extent also Rodriguez, is **unique** and cannot be duplicated by mere words in the trial transcript. This audio-video established indisputably that Perera believed based on Perera's intricate knowledge of this fraudulent scheme that Dr. Alvarez, herself, did not know that Medicare fraud was being perpetrated. This visual and verbal conduct on the part of Perera occurred when Perera's only motive to speak those words was self-preservation and avoidance of arrest. This evidence does more than merely impeach Perera's in-court testimony that everyone had to know that fraud was occurring at St. Jude. It was demeanor evidence that was not substitutable by mere words. This video visually placed the raw statement of Perera in a different category than

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[9] The copy given to the defense by the Government and excluded by the trial judge was filed in the lower appellate court for that court to review.

almost all out-of-court statements that are normally sought to be admitted at a subsequent trial.

Because of the totality of the circumstances under which it was obtained, this video was dynamite **exculpatory** evidence on the facts of this case. A reasonable criminal fearing arrest would not have made that statement with those simultaneous facial expressions unless that criminal knew that defendant Ana Alvarez, herself, did not know at that moment what the criminal scheme was that this criminal was perpetrating. This jury should have weighed the exculpatory visual evidence contained in this video against the in-court statement of Perera, which was made when Perera had every motive to enhance the value of her post-guilty-plea testimony by making the bald unsupported assertion that "everybody knew exactly what was going on." Perera's reaction when making her statement on that video established that Dr. Ana Alvarez was not an insider in the master scheme of the Benitez brothers. It is not the words that were uttered, but the visual reaction of Perera when those words were uttered.

If Dr. Alvarez did not know that this clinic was engaged in fraudulent billing as of her last day of work on November 17, 2003, it is obvious that Dr. Alvarez did not know of the fraudulent billing **any time** since Dr. Ana Alvarez started to work at this clinic. If in the mind of Perera and Rodriguez, Dr. Ana Alvarez did not know that Medicare fraud was occurring at St. Jude on the very last day that Dr. Ana Alvarez worked at St. Jude, that video **would have**

had an effect on *this* jury. This video corroborates **Dr. Alvarez's** denial of guilty knowledge like no other evidence could. This jury was deprived of the need for the Government to argue to this jury that these jurors should not trust their lying eyes.

The lower court opinion, itself, belies the legal correctness of its analysis. In its opinion, the appellate court accurately characterizes the video as "potentially powerful exculpatory evidence." The flaw in the legal analysis is the fact that the lower appellate court actually equated that evidence with the during-trial cross-examination of Rodriguez. The lower court opinion is accurate to the extent that the attorney for a codefendant – but not the attorney for defendant Ana Alvarez – did ask Rodriguez if words were uttered during that confrontation that no fraud was going on at that clinic. However, the **visual** observation of both Perera and Rodriguez **during** their commission of this crime could not be elicited by post-event questioning. The lower appellate court missed the mark when it concluded that "the exclusion of this videotape was harmless error because it was **duplicative** of witness testimony discussing the exculpatory content of the videotape." That is not following the law established by this Court in *Kotteakos*, *supra*.[10]

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[10] Overwhelming evidence of fraud does not equate with overwhelming evidence that **Dr. Ana Alvarez** knew that fraudulent bills were being submitted to Medicare for payment.

The lower court opinion also accurately quotes in footnote 1 that defendant Alvarez mentioned this fact in a single line during a lengthy closing argument. The lower court opinion mischaracterizes that this single sentence was "stressed" during defense counsel's closing argument, given that defense counsel was deprived of the **visual** evidence of innocence. The accurate reflection of the record of the entire trial is that Dr. Ana Alvarez's defense counsel was forced to rely on the cross-examination by other counsel, because this defense counsel was disarmed of this one-of-a-kind exculpatory evidence.

It is critical that the appellate court made its evaluation of harmless error after expressly erroneously considering as substantive evidence before the jury the fact that the jury disbelieved Dr. Ana Alvarez's denial of actual knowledge that fraud was occurring prior to August 27, 2003, when Dr. Alvarez began meeting with the F.B.I. Indeed, the Government argued in its brief that any error was harmless, among other reasons, because "the weight of the evidence, including A. Alvarez's own testimony, was overwhelming." For that reason, the resolution of this question is tied to the resolution of the first question in this petition.[11]

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[11] Should this Court remand on the issue of sufficiency of the evidence rather than address the sufficiency question itself, this Court should also remand on the issue of harmless error following erroneous exclusion of the F.B.I. DVD.

On the entire record, the Government did not meet its burden of satisfying the *Kotteakos* standard, after the Government successfully and erroneously kept this evidence from the jury. The ubiquitous use of the federal harmless error statute in criminal cases warrants consideration of this question to ensure that it not be misapplied as interpreted by this Court.

CONCLUSION

For the above stated reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-17178

D. C. Docket No. 08-20270-CR-FAM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

SANDRA MATEOS,
ANA ALVAREZ,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(October 19, 2010)

Before O'CONNOR, Associate Justice,* and CARNES and ANDERSON, Circuit Judges.

O'CONNOR, Associate Justice (Ret.):

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* Honorable Sandra Day O'Connor, Associate Justice of the United States Supreme Court (Ret.), sitting by designation pursuant to 28 U.S.C. § 294(a).

Dr. Ana Alvarez and Nurse Sandra Mateos were employees at St. Jude Rehabilitation Center during its brief time as an operating clinic in 2003. St. Jude was ostensibly an HIV treatment center, but it was established as a front for a massive Medicare scam. The fraud involved falsely diagnosing patients with a condition that would justify treatments of WinRho, an expensive drug reimbursable by Medicare at a rate of about $4,900 per treatment to St. Jude. Because the treatment was medically unnecessary, employees at St. Jude would purchase only a small fraction of the drugs and drug treatments for which they billed Medicare. They would then use a simple saline solution or an extremely diluted dose of WinRho to inject patients, thereby pocketing much of the money that Medicare had paid for the WinRho treatments. All of the patients were HIV-positive Medicare beneficiaries who had been recruited for the purpose of seeking WinRho treatments they did not actually need. The patients were typically paid about $150 per visit in exchange for their knowing participation. During the approximately five-month span in which this scam continued, St. Jude received more than $8 million from Medicare.

For their roles in this operation, Dr. Alvarez and Nurse Mateos were indicted on several counts. Both Alvarez and Mateos were indicted for: (1) conspiracy to defraud the United States, to cause the submission of false claims, and to pay health care kickbacks, in violation of 18 U.S.C. § 371; and (2) conspiracy to commit health care fraud, in violation of 18 U.S.C.

§§ 1347 and 1349. While Mateos was charged with only those two counts, Alvarez faced three additional counts of (3-5) submission of false claims, in violation of 18 U.S.C. § 287. Mateos was convicted of both counts, and Alvarez was convicted of all five of her counts. Mateos was sentenced to 7 years' imprisonment, and Alvarez to 30 years' imprisonment.

On appeal, Alvarez and Mateos each raise various arguments challenging their convictions and sentences. We reject all but one of their arguments outright. The one meritorious argument is raised by Alvarez, who correctly contends that the district court improperly excluded a videotape containing exculpatory evidence. The surreptitious recording, made near the tail end of the clinic's operation, arguably showed coconspirators assuring Alvarez that there was no fraudulent scheme at St. Jude. We agree with Alvarez that the statement at issue in the tape was potentially powerful exculpatory evidence because a conspirator's denial of the existence of Medicare fraud to Alvarez is certainly in tension with the theory that Alvarez was privy to the scheme. We also agree with Alvarez that the statement was not hearsay, contrary to the district court's ruling, because it was not being offered for the truth of the matter asserted. *See* Fed. R. Evid. 801(c) ("'Hearsay' is a statement . . . offered in evidence to prove the truth of the matter asserted."). That is, Alvarez was not seeking to prove through the statement that there was no fraud at St. Jude – a point that was repeatedly conceded during her own testimony – but that the behavior of

concealing the scheme from her was inconsistent with the prosecution's theory that she had knowledge of the scam.

Nonetheless, the exclusion of this videotape was harmless error because it was duplicative of witness testimony discussing the exculpatory content of the videotape. Indeed, Alvarez's attorney stressed this testimony in his closing argument.

Because this lone error was harmless, we AFFIRM the convictions and sentences of both Alvarez and Mateos.

I

The fraud at St. Jude involved an extensive cast of characters. Aisa Perera and Mariela Rodriguez (M. Rodriguez) were the catalysts behind St. Jude's creation. Perera approached M. Rodriguez in 2002 with an opportunity to work with her in starting up a new health care clinic. The two eventually decided the clinic should target Medicare patients. Perera then met with Rita Campos, who owned a medical billing company, to discuss the endeavor. Campos told her that Luis Benitez would be able to provide her with everything she needed to start a lucrative clinic treating HIV-positive patients. Perera then met with Benitez, and, as Campos indicated, he provided the money and personnel necessary to start the clinic.

St. Jude was one of eleven clinics funded and established by Luis Benitez and his brothers Carlos

and Jose Benitez. They started their clinics for the purpose of committing Medicare fraud. Luis Benitez provided the start-up capital, nurses, and supplies, and he sent an individual named Thomas McKenzie to train St. Jude's medical personnel. McKenzie had trained the staff at many of the Benitez brothers' clinics. He had a medical degree from Guatemala but was not licensed to practice medicine in the United States. He instructed St. Jude's two doctors as to how they should document their patients' charts so that Medicare would pay for WinRho treatments. WinRho is generally used to treat HIV patients suffering from thrombocytopenia or idiopathic thrombocytopenic purpura (ITP), a condition marked by an abnormally low platelet count. Before St. Jude began operating, McKenzie instructed the clinic's medical staff that the objective in filling out patient charts was to make the patient files compatible with a diagnosis of thrombocytopenia, and that bleeding disorders would justify the diagnosis even though a laboratory test would be necessary to confirm the condition.

The clinic employed two licensed doctors, Dr. Orestes Alvarez-Jacinto and his daughter, Appellant Ana Alvarez. During their careers, Alvarez-Jacinto specialized in gynecology, and Alvarez's field of expertise was endocrinology and internal medicine. Neither had significant experience treating HIV patients. McKenzie trained each of them to note bleeding disorders on their patients' charts so as to justify WinRho treatments.

Alvarez-Jacinto and Alvarez began seeing patients on the day that St. Jude opened. All of the patients were HIV-positive Medicare beneficiaries, but they were not seeking treatment in earnest; they, too, were in on the scam. The Benitez brothers recruited them to seek treatment at St. Jude, provided transportation to the clinic for those who needed it, and paid the patients kickbacks ranging from $150 to $300 per visit. While the patients were apparently coached to make generic complaints about bleeding disorders, Dr. Alvarez-Jacinto and Dr. Alvarez would prescribe WinRho even when patients neglected to complain of any relevant symptoms. Occasionally, McKenzie would review the patient charts prepared by Alvarez, and if they failed to indicate a history of bleeding so as to support a thrombocytopenia diagnosis, he would instruct her to correct the charts, and she would comply.

An institution can only bill Medicare for treatments if it has a Medicare provider number. Because St. Jude did not have a provider number, Alvarez was enlisted to obtain one in her own name (Alvarez-Jacinto already had his own number). To obtain her provider number, Alvarez signed a form agreeing to comply with applicable laws and Medicare regulations and certifying that she would not "knowingly present or cause to be presented" false or fraudulent claims, nor submit claims "with deliberate ignorance or reckless disregard for their truth or falsity." All of St. Jude's claims were submitted under either Alvarez-Jacinto's or Alvarez's provider number. Rita

Campos was in charge of billing Medicare for the treatments, a service she had provided for the Benitez brothers at their various clinics. She would help prepare what are known as "superbills" for the patients, each showing the same diagnosis code: 287.3, the Medicare billing code for thrombocytopenia. Either Alvarez or Alvarez-Jacinto would sign each of the superbills before it was sent to Medicare.

The nurses at St. Jude were charged with administering the treatments – typically an injection of saline solution or heavily diluted WinRho – and with paying the patients their kickbacks with money they received from M. Rodriguez and Perera. The two nurses at St. Jude were both sent by the Benitez brothers: Appellant Mateos, who had once been married to Luis Benitez, and Carmen Gonzalez, a cousin of the Benitez brothers. Also working at the clinic were Angel Rodriguez (A. Rodriguez), a medical assistant who helped with the infusions, and Beatriz Delgado, a receptionist who was paid $8,000 per month for allowing her name to be listed as president on St. Jude's corporate papers.

St. Jude was an operating clinic for less than five months, from July 2003 to mid-November 2003. The doctors saw about 70 patients per week, and most of the patients came multiple times each week. Many of the patients were homeless or otherwise impoverished; some were "professional patients" who would sit for multiple treatments at as many clinics as were willing to pay them. Sometimes patients did not stay to receive an infusion of any sort, but were paid

anyway. On several occasions patients got angry and loudly demanded more money, and these demands were loud enough to be heard throughout the small clinic, which was only about 1100 square feet.

All told, the clinic billed Medicare for about $11 million, and Medicare actually paid more than $8 million. Payment for bills submitted under the two doctors' provider numbers went directly into St. Jude's bank account. The doctors received a fixed salary. Despite her lack of experience in HIV treatment, Dr. Alvarez was paid $4000 a week (later raised to $5000) for working three days per week at the clinic. For her role, Nurse Mateos was paid approximately $500 a week. The bulk of the money went to the Benitez brothers, who received 60 percent of the profits, and Perera and M. Rodriguez, who split the remainder.

The investigation into St. Jude began shortly after the clinic's opening. In mid-August 2003, Alvarez discussed her work at St. Jude with a colleague at her second place of employment, a legitimate clinic where Alvarez worked two days a week and was paid substantially less. The colleague became concerned and urged Alvarez to speak with the director of the legitimate clinic. The director in turn had Alvarez contact the F.B.I., which scheduled an interview with Alvarez.

Alvarez had her first meeting with F.B.I. agents on August 27, 2003. One of the agents present at this first interview was Special Agent Thomas Adams.

Alvarez told the agents that she was concerned about the tax consequences of the clinic billing under her provider number, and that she had heard that patients might be getting paid. Alvarez concealed much of her own involvement in the fraud, though, hiding the fact that she was prescribing medically unnecessary treatments and fraudulently billing Medicare for the treatments. The agents asked her about the infusion treatments she prescribed at St. Jude and showed her Medicare's Local Medical Review Policy. The Policy stated that WinRho was only approved for treating patients with platelet counts below 30,000 per microliter of blood, and was not an appropriate treatment for any other medical condition. None of Alvarez's patients were anywhere near that benchmark, as the lowest recorded platelet count for any of her patients was 90,000 per microliter of blood. Although Alvarez claimed that the FBI encouraged her to stay at St. Jude during the rest of her tenure there, Agent Adams testified that he gave her no such advice. Even after the agents showed her Medicare's Local Medical Review Policy indicating that it was not medically appropriate, Alvarez continued to prescribe WinRho infusions to patients at St. Jude until she quit in November 2003.

Alvarez told the agents that she wanted to quit the clinic on November 14, 2003. Agent Adams asked her to stay a few more days so that the agents would have time to set up a covert recording of her conversation. Agent Adams testified that his aims in making the recording were twofold: to obtain

incriminating statements from Perera and M. Rodriguez, and to evaluate the credibility and possible involvement of Alvarez and Alvarez-Jacinto in the fraud. Alvarez agreed to make the recording, and on November 17, 2003, she went to the clinic wearing a microphone and carrying a concealed video camera in her purse. In the recorded conversation, Alvarez and her father told Perera and M. Rodriguez that they were worried about the amount of money being billed under their provider numbers, and Alvarez announced her intention to quit. At one point during the conversation, Perera said, "there's no fraud whatsoever here, doctor," but it is not clear what prompted that statement. Alvarez and Alvarez-Jacinto then quit working at the clinic. Without any doctors and without a provider number, St. Jude could no longer bill Medicare and had to suspend its operations.

After St. Jude closed its doors, the investigation progressed slowly as federal authorities first turned their attention to other Benitez clinics. The first charge specifically related to St. Jude did not come until mid-2007, when Alvarez-Jacinto pled guilty to a single count of conspiracy to commit health care fraud. He was sentenced to only 18 months of imprisonment after the sentencing judge granted him a downward variance on account of his advanced age and poor health. Rita Campos pled guilty in 2007 to one count of conspiracy to commit health care fraud and one count of submitting false claims. She initially received a sentence of 120 months, but her sentence was later reduced to 48 months after the government

moved for a Rule 35(b) sentence reduction on account of her substantial assistance. Fed. R. Crim. Pro. 35(b). In May 2008, the three Benitez brothers and Thomas McKenzie were indicted on numerous counts involving fraud at eleven different HIV-treatment clinics (including St. Jude). The Benitez brothers fled the country, and McKenzie pled guilty to one count of conspiracy to commit health care fraud and one count of submitting false claims. McKenzie was initially sentenced to 168 months, but his sentence was reduced to 95 months based on the government's Rule 35(b) motion.

The particular proceeding below began with the indictment of seven individuals: Ana Alvarez, Sandra Mateos, Aisa Perera, Mariela Rodriguez, Beatriz Delgado, Angel Rodriguez, and Carmen Gonzales. Gonzales skipped bail and disappeared before trial. Perera and M. Rodriguez pled guilty and, after initially receiving sentences of 30 months and 70 months respectively, each was ultimately sentenced to 24 months of imprisonment after the government's Rule 35(b) motions for sentence reductions. Four defendants proceeded to a joint trial: Alvarez, Mateos, Delgado, and A. Rodriguez.

At trial, the government's basic theory was that the fraud at St. Jude was so transparent and so flagrant that it would have been impossible for any employee not to have known what was going on. The government's witnesses included Perera, M. Rodriguez, McKenzie, Agent Adams, and Dr. Michael Wohlfeiler, an expert witness who testified that

among approximately 2,500 HIV-positive patients he was treating in his own practice, he had not seen a single case within the last ten years where a patient's platelet level was low enough to require treatment with WinRho. He also testified that if a patient actually needed a drug like WinRho, it would be given once every several weeks and only after careful monitoring, whereas the patients at St. Jude would receive infusions several times a week. Wohlfeiler also testified that WinRho could have potentially harmful side effects ranging from allergic reactions to kidney failure and death. He noted that this information was easily available both in the Physician's Desk Reference, a standard reference book typically found in any doctor's office and available online, and in the manufacturer's product information sheet that was packaged with each vial of the drug.

Each of the four defendants conceded that St. Jude was a fraudulent operation, but claimed that they themselves were unaware of the fraud during their employment because they had been duped by Perera, M. Rodriguez, and McKenzie.

Alvarez testified in her own defense. She said that she relied on McKenzie's instructions because she thought he was an expert in treating HIV; she claimed to have no idea that the WinRho infusions were medically unnecessary. She denied any knowledge of the billing fraud, and said she was unaware that the code 287.3, which appeared on all the superbills she signed, was the billing code for thrombocytopenia. Alvarez also relied heavily on her

contacts with the F.B.I. as evidence that she had no knowledge of the scheme, and argued that any criminal activity taken after her first meeting with F.B.I. agents was at their behest because they urged her to continue working at the clinic, a claim which Agent Adams denied in his testimony.

During the government's cross-examination, Alvarez conceded that WinRho was medically unnecessary for her patients, but asserted that she did not know as much during her time at St. Jude because she trusted McKenzie. She also testified that she never consulted the Physicians Desk Reference or looked at WinRho's product insert before prescribing hundreds of doses of the drug. She claimed that she did not become aware until shortly before trial that Medicare's Local Medical Review Policy dictated that WinRho was not appropriate unless a patient had a platelet count below 30,000 per microliter of blood. Agent Adams's testimony again contradicted her on this point, as he testified that the agents had shown her the Policy at their first meeting.

At several points during the trial, including during her own testimony, Alvarez sought to admit the surreptitiously recorded videotape of her resignation, during which Perera appears to assure Dr. Alvarez and Dr. Alvarez-Jacinto that there was no fraud occurring at St. Jude. The government objected to the tape's admission, citing hearsay concerns. Alvarez countered that the exculpatory statements were not hearsay at all; Perera's assurances that there was no fraud at St. Jude were clearly false, and

Alvarez sought to admit them not for their truth, but as circumstantial evidence that Alvarez was not privy to the scheme at St. Jude. Alternatively, Alvarez argued that the comments in the tape could be admitted as coconspirator statements, *see* Fed. R. Evid. 801(d)(2)(E), or as fitting within the "state of mind" exception to the rule against hearsay, *see* Fed. R. Evid. 803(3). The judge sustained the government's objections and excluded the videotape. However, some of the tape's content was admitted into evidence through witness testimony. During cross-examination of M. Rodriguez, the following exchange occurred:

> Q: Now, at the time that Dr. Ana Alvarez came and questioned you and Aisa, back on November 17, 2003, do you recall that date?
>
> A: Yes.
>
> . . . .
>
> Q: Dr. Alvarez was there, Angel Rodriguez was there, you were there, Aisa Perera was there and Dr. Orestes [Alvarez-] Jacinto was there, correct?
>
> A: That is correct.
>
> Q: At that time, the doctors confronted you and Aisa about what was going on at the clinic, correct?
>
> A: Yes.
>
> . . . .

Q: At that time, you and Aisa told the doctors and Mr. Angel Rodriguez that there was no fraud going on at the clinic whatsoever, isn't that true?

A: We told the doctors, actually Angel wasn't even part of that conversation. It was very little what he said.

Q: Let me rephrase my question. . . . Did you and Aisa tell the doctors that there was no fraud going on whatsoever at the clinic, yes or no?

A: Okay. Well, there is one issue on that conversation, where I do specify to Dr. Orestes Alvarez-Jacinto because he does emphasize us on using his [provider] number somewhere else on another office and I did tell him there, that we are not doing fraud with your number, nowhere else. That's what I meant. That's what he was talking about.

Q: Aisa Perera says, "there's no fraud going on at this clinic whatsoever doctor," does she not?

A: She did say that.

Doc. 317:934-35. Counsel for Alvarez stressed this exchange during his closing argument.

Mateos did not testify, but her defense theory was that she was but a lowly employee at St. Jude with no knowledge of the fraud. Her defense focused on the fact that her salary was only $500 a week, a

measly sum for somebody participating in such a large-scale fraud in which the ringleaders were pocketing millions of dollars. She also filed a pre-trial motion seeking to prevent the government from making any mention of her prior marriage to Luis Benitez on the basis that such evidence would be overly prejudicial. *See* Fed. R. Evid. 403. The district court denied the motion, and the government mentioned the close relationship between Mateos and L. Benitez on several occasions during the trial to combat Mateos's claimed ignorance about the fraud.

The jury convicted Alvarez and Mateos on all counts, and acquitted Delgado and A. Rodriguez on all counts.

At sentencing, Alvarez faced a statutory maximum of 30 years' imprisonment. The Presentence Report began the calculation of Alvarez's guidelines sentencing range with a base offense level of 6 under U.S.S.G. § 2B1.1(a)(2), because the offense was one involving fraud. Added to that base offense level were twenty levels under § 2B1.1(b)(1) because the loss amount was between $7 million and $10 million; two levels under § 2B1.1(b)(9)(C) because the offense involved sophisticated means; two levels under § 2B1.1(b)(13)(A) because the offense involved conscious or reckless risk of death or serious bodily injury; three levels under § 3B1.1(b) for Alvarez's managerial role in an offense involving more than five participants; and two levels under § 3B1.3 for abuse of a position of trust. Alvarez's PSR calculated a Guidelines range of 168 to 210 months'

imprisonment. The district court's acceptance of the enhancements and the addition of two levels under § 3C1.1 for obstruction of justice for delivering perjured testimony at trial produced an adjusted offense level of 37. Alvarez objected to the obstruction enhancement and offered the results of three polygraph examinations she had commissioned to support her claim that she had been unaware of the fraud at St. Jude while working there. The first two polygraphs came back "inconclusive," but the third determined that she was answering truthfully during the following exchange:

> Q: Prior to talking with FBI agents, did you know that anyone from St. Jude planned to send fraudulent bills to the U.S. Government?
>
> A: No.
>
> Q: Prior to talking with FBI agents, did you agree with anyone who was working at St. Jude to participate in a fraudulent scheme to collect money from the U.S. Government?
>
> A: No.

The district court was unmoved by the polygraphs, explaining that it was basing its finding of perjury on its own assessment of Alvarez's trial testimony.

With the obstruction enhancement, Alvarez's Guidelines range was 216 to 262 months, and the government recommended a sentence of 262 months. The court considered the sentencing factors provided

in 18 U.S.C. § 3553(a) at some length, and concluded that the seriousness of the crime, the position of trust Alvarez held as a doctor, and the need to deter the growing number of people committing Medicare fraud all warranted a sentence above the Guidelines range. The court sentenced Alvarez to the statutory maximum on each count, running each sentence consecutively, for a total prison term of thirty years. The court also imposed three years' supervised release, restitution of $8,289,286 to be paid to the United States government, and forfeiture of various assets.

Mateos faced a statutory maximum of 15 years of imprisonment. Her PSR calculated her Guidelines range as 97 to 121 months, and included two enhancements that Mateos objected to at sentencing. The first was a twenty-level enhancement because the amount of loss caused by the fraud was more than $9 million. *See* U.S.S.G. § 2B1.1(b)(1)(K) (twenty-level enhancement if the loss was between $7 million and $20 million). Mateos argued that she should not be held responsible for the full amount because her role in the conspiracy was extremely limited, and the district court should have calculated the loss directly attributable to her behavior. She also objected to an enhancement under U.S.S.G. § 2B1.1(b)(13)(A), which applies to offenses involving "conscious or reckless risk of death or serious bodily injury," claiming that there was no evidence that she knew giving saline or diluted WinRho treatments could be harmful. The district court rejected both arguments. Mateos's Guidelines range was 78 to 97 months, and the court

sentenced her to 84 months' imprisonment. It also imposed three years of supervised release and ordered Mateos to pay restitution to the United States government in the amount of $8,289,286.

Alvarez and Mateos now challenge their convictions and sentences on appeal.

II

Both Alvarez and Mateos challenge the sufficiency of the evidence supporting their convictions. Alvarez contends that there was insufficient evidence to convict her of any of her five charges. Mateos concedes there was sufficient evidence to convict her of paying kickbacks under count 1 of the indictment, *see* 18 U.S.C. § 371, and challenges only the more serious conviction for health care fraud conspiracy under 18 U.S.C. §§ 1347 and 1349.

When considering a sufficiency challenge, we view the evidence in the light most favorable to the jury's verdict, and draw all reasonable inferences and resolve all credibility determinations in favor of the government. *United States v. Ellisor,* 522 F.3d 1255, 1271 (11th Cir. 2008). "[I]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided that a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *United States v. Merrill,* 513 F.3d 1293, 1299 (11th Cir. 2008)

(citation omitted). We consider each of their challenges in turn.

A. Alvarez

Alvarez argues that the evidence was insufficient to support her convictions on all counts. With regard to the conspiracy counts (counts 1 and 2), Alvarez concedes that the government proved that a conspiracy to commit healthcare fraud existed at St. Jude, but she claims that none of the evidence established that she knowingly participated. In particular, she argues that the evidence showed that she: (1) was recruited by her father and not by Benitez, (2) was not involved in the billing process and never saw the Medicare checks, (3) never paid kickbacks, and (4) merely followed McKenzie's instructions. With regard to the submission of false claims counts (counts 3-5), Alvarez concedes that the three superbills she signed were false but argues that there was no evidence that she knew they were false when she signed them.

The circumstantial evidence that Alvarez was privy to the scheme at St. Jude is sufficient to support her convictions. She was trained by McKenzie to document each patient's chart in the same manner; she altered the charts when instructed; she was informed by Agent Adams at her first meeting with the F.B.I. that her patients did not qualify for WinRho treatments; she was present when patients at St. Jude screamed about wanting more money; and the billing code number on the Medicare superbills

she signed was always the same, regardless of what the patient charts said. While it is hypothetically possible that a person under these circumstances could have been ignorant of the fraud, the jury was entitled to draw the reasonable inference from this evidence that Alvarez was in on the scheme. "The very nature of conspiracy frequently requires that the existence of an agreement be proved by inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme." *United States v. Molina,* 443 F.3d 824, 828 (11th Cir. 2006) (citation omitted). Likewise, "[a] conspiracy conviction will be upheld . . . when the circumstances surrounding a person's presence at the scene of conspiratorial activity are so obvious that knowledge of its character can fairly be attributed to [her]." *United States v. Figueroa,* 720 F.3d 1239, 1246 (11th Cir. 1983).

Even putting the government's affirmative case aside, Alvarez's own testimony greatly undermines her sufficiency argument. A defendant who chooses to testify runs the risk that the jury will disbelieve her testimony, and "runs the risk that if disbelieved the jury might conclude the opposite of [her] testimony is true." *United States v. Brown,* 53 F.3d 312, 314 (11th Cir. 1995) (citation omitted); *see also United States v. Hunt,* 526 F.3d 739, 745 (11th Cir. 2008) (same). This is especially so in cases, such as the one at bar, that turn mainly on subjective elements, like a defendant's intent or knowledge. *Brown,* 53 F.3d at 315. When Alvarez insisted that she did not know that the procedures she prescribed were medically

unnecessary, or that the bills she signed were being doctored to obtain payment from Medicare, the jury was entitled to conclude that she was lying, and we must accept that credibility determination. The evidence was sufficient for a reasonable jury to find Alvarez guilty beyond a reasonable doubt on all counts.

B. Mateos

Mateos argues that the evidence failed to show that she knew that St. Jude was submitting fraudulent claims to Medicare. In particular, she claims that she (1) had no access to the clinic's accounts, (2) played no role in the billing process, (3) was not paid based on the clinic's earnings, (4) merely provided the patients with treatment the doctors prescribed, and (5) had no knowledge that Medicare may have been billed for services not actually provided. Mateos also places a great deal of weight on the fact that, in rejecting her motion for judgment of acquittal, the district court described the evidence against her as "weak."

While we agree with the district court that the evidence against Mateos was not overwhelming, it was sufficient to support the jury's guilty verdicts. The evidence showed that Mateos was recruited by the Benitez brothers to work as an infusionist at St. Jude and to pay kickbacks to the patients, which she did. In addition, Mateos provided patient care and administered the treatments of diluted WinRho

and saline, leading to the reasonable inference that she knew the treatments the patients were receiving were all the same and that she knew there was not enough medication on hand to administer the thousands of doses that the charts indicated were being administered. There was also evidence that she paid some patients who did not even receive treatment, which lends strong support to an inference that she knew any billing for those patients was fraudulent.

Mateos counters that her role was similar to the secretary's role in *United States v. Medina*, 485 F.3d 1291 (11th Cir. 2007), a case in which this Court reversed the conviction of a secretary who was involved in paying kickbacks to patients because the evidence was insufficient to establish that she knew the clinic was providing medically unnecessary services or fraudulently billing Medicare. *Id.* at 1297-1300. But unlike the secretary in *Medina*, Mateos both paid the patients and administered the treatments. It was not necessary for Mateos to know "all the details" of how the fraud worked in order for her to be guilty of the conspiracy. *United States v. Perez-Tosta*, 36 F.3d 1552, 1557 (11th Cir. 1994). Mateos was not a mere secretary. She was a licensed nurse and had been trained as a doctor in her native Cuba. In light of her medical expertise, the circumstances of the fraud going on around her were so obvious that knowledge of it can fairly be attributed to her. Because Mateos was one of only three people who worked in the infusion room, and one of only two nurses who were responsible for mixing the correct

quantity of the drug into saline solution for intravenous infusion, the jury could reasonably infer her awareness of the discrepancy between the amounts of WinRho prescribed and the amounts actually given. Mateos, like anyone else in the cramped clinic quarters, also could not have avoided overhearing patients screaming that someone was getting rich with their Medicare number. The presence of fraud at St. Jude was so obvious that, as with Alvarez, Mateos's knowledge of its character could fairly be attributed to her. *See Figueroa,* 720 F.2d at 1246.

III

Alvarez and Mateos each raise one claim of evidentiary error. Alvarez argues that the district court erred when it excluded a videotape showing Perera assuring her and her father that there was no fraud occurring at St. Jude, and Mateos argues that the district court erred when it denied her motion to exclude any mention of her past marriage to Luis Benitez.

A. The videotape

At trial, Alvarez argued that the surreptitiously recorded videotape of her resignation was strong exculpatory evidence. In particular, Perera's statement that, "there's no fraud whatsoever here, doctor," showed that Alvarez was not privy to the fraudulent scheme. The government objected to the tape's admission on the basis that it was hearsay, and the

district court sustained the objection and excluded the videotape from evidence.

The district court erred when it excluded the videotape. The relevant comment on the tape was not hearsay at all because it was not being offered for the truth of the matter asserted. *See* Fed. R. Evid. 801(c). Alvarez sought to admit the statement not as evidence that there was no fraud at St. Jude, a point which no defendant contested, but as evidence that she did not know of the fraud. "If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay." Fed. R. Evid. 801(c), Advisory Committee's Note; *see also* 5 J. Weinstein and M. Berger, Weinstein's Federal Evidence § 801.10(2)(c) (2d ed. 2008) ("Sometimes the relevance of words or actions to show a particular fact depends on drawing an inference that a person would not have spoken or acted in a certain way unless the person believed a certain fact to be true.").

The government's response to this reasoning tracks the exact error the district court made in excluding the tape: it argues that the comment does not qualify as a coconspirator statement under Fed. R. Evid. 801(d)(2)(E), and does not fit within the "state of mind" exception in Fed. R. Evid. 803(c). These responses are totally inapposite. If the statement is not hearsay in the first place, there is no need for it to fit within an exception to the rule against hearsay. *Cf.* Fed. R. Evid. 402 (establishing presumption that all relevant evidence is admissible). Just as

the district court did, the government focuses on the fact that the statements do not fit within an exception to the rule against hearsay, thereby skipping over the prior and all-important question of whether the statement was hearsay at all.

While the district court erred in excluding the relevant portion of the videotape, the error was harmless because the exculpatory content of the tape was effectively admitted through witness testimony. *See Kotteakos v. United States,* 328 U.S. 750, 764 (1946) ("If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand. . . ."). In this case, the only exculpatory statement in the videotape that Alvarez relies on is Perera's statement that there was no fraud going on at St. Jude – a statement that was admitted during the cross-examination of M. Rodriguez. Alvarez's attorney even attempted to capitalize on this point during his closing argument, without interruption from the government or the district court.[1] The jury

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[1] During closing argument, Alvarez's counsel stated: "They'd like to forget the part about when confronted with the fraud, how Mariela [Rodriguez] reacts. Mariela says, there is no fraud. Mariela and Aisa [Perera] go running to the Benitez brothers. The doctors discovered the fraud, what do we do? Benitez brothers say, offer them more money. What happens when the doctors discover the fraud? They have to close down the clinic." Doc. 319:1578. In this excerpt, Alvarez's counsel mistakenly attributes the statement to M. Rodriguez, when it was actually made by Perera (though it came into evidence during cross-examination of M. Rodriguez).

was simply unconvinced that Perera's denial established that Alvarez did not know of the conspiracy. Because the only exculpatory statement on the tape was admitted into evidence through other means, the erroneous exclusion of the tape was harmless error.

B. Mateos's past marriage to Luis Benitez

Over Mateos's objection, the district court allowed government witnesses to mention that she was once married to Luis Benitez, whom the prosecutor referred to as the "Godfather" of St. Jude. The district court found that the evidence was relevant because it suggested that Mateos was somebody who Luis Benitez would trust, but it gave the jury a limiting instruction, which stated that "the mere fact that certain persons may have associated with each other" does not by itself establish a conspiracy. On appeal, Mateos does not dispute the relevance of her relationship with Benitez. *See United States v. Ritz,* 548 F.2d 510, 522 (5th Cir. 1977) ("The fact of the close association of the [defendants is] . . . one circumstance from which the jury might infer knowledge" of a conspiracy.). She instead argues that the district court abused its discretion in admitting evidence of her relationship with Luis Benitez because it was substantially more prejudicial than its minimal probative value, *see* Fed. R. Evid. 403, and the prejudice was not adequately curbed by the limiting instruction.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger

of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. "Because a trial court has broad discretion to determine the admissibility of evidence," this Court reviews evidentiary rulings for an abuse of discretion. *Ellisor,* 522 F.3d at 1266 n.12. Moreover, a limiting instruction may be sufficient to cure the risk of undue prejudice in limited circumstances. *See United States v. Hands*, 184 F.3d 1322, 1329 (11th Cir. 1999).

Here, the district court did not abuse its discretion by refusing to exclude evidence that Luis Benitez was Mateos's ex-husband. The evidence was relevant to the issue of her guilt, *Ritz,* 548 F.2d at 522, and it posed little threat of undue prejudice. The concept expressed in the limiting instruction, that people should not be adjudged guilty based on their past or present relationships, is a simple one that the jury could easily understand and take to heart.

Mateos's reliance on *Hands,* 184 F.3d at 1329, is misplaced. In *Hands,* this Court found reversible error when the district court allowed the government to impeach a testifying defendant with evidence that he had beaten his wife. *Id.* at 1325. Because the evidence of spousal abuse had nothing to do with the drug conspiracy for which the husband was on trial, we held that its minimal probative value in impeaching the defendant was outweighed by its prejudicial impact. *Id.* at 1328-29. *Hands* is not similar to this case. Unlike the violent spousal abuse in that case,

there is nothing visceral or inflammatory about the fact that Mateos was previously married to Benitez. It simply suggests that the organizers of the conspiracy were likely to trust Mateos, and it increases the likelihood that she knew what was going on at St. Jude. And it certainly was not inflammatory to such an extent that the district court's limiting instruction would not have been effective.

The district court did not abuse its discretion in concluding that the prejudicial impact of this evidence did not substantially outweigh its probative value.

IV

The five remaining claims of error all target the sentencing phase of the proceedings below. Alvarez raises three claims: (1) that her sentence was substantively unreasonable; (2) that the district court erred when it refused to consider the results of her polygraph examination at sentencing; and (3) that the district court's restitution order was unlawful because the United States is not a "person" who can be a "victim" owed restitution under the Mandatory Victim Restitution Act of 1996 (MVRA). Mateos raises two claims of error: (1) that the district court erred by attributing the entire intended loss of the conspiracy to her when calculating her Guidelines range; and (2) that the district court erred when it enhanced her Guidelines range based on its finding that her offense

involved a conscious or reckless risk of death or serious bodily injury. We consider each argument.

A. The reasonableness of Alvarez's sentence

We review the reasonableness of the district court's sentencing decision for an abuse of discretion. *Gall v. United States,* 552 U.S. 38, 46 (2007); *United States v. Irey,* 612 F.3d 1160, 1188-89 (11th Cir. 2010) (en banc). "[A] district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications." *Gall,* 552 U.S. at 46. We will not invalidate a sentence unless we are "left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *Irey,* 612 F.3d at 1190 (quoting *United States v. Pugh,* 515 F.3d 1179, 1191 (11th Cir. 2008)).

The district court sentenced Alvarez to the statutory maximum, imposing the maximum penalty on each count and then running all counts consecutively. Her thirty-year sentence exceeds the top of the Guidelines range (262 months) by slightly more than eight years. Because of the deviation from the Guidelines, the district court was required to provide "sufficiently compelling" justifications to support the degree of the variance. *Gall,* 552 U.S. at 50; *Irey,* 612 F.3d at 1187.

Nevertheless, this Court reviews all sentences (whether below, within, or above the Guidelines range) under the same deferential abuse of discretion standard, and it may not presume that a sentence outside of the Guidelines range is unreasonable. *Gall,* 552 U.S. at 51; *Irey,* 612 F.3d at 1187.

Here, the district court did not abuse its discretion by varying upward from the Guidelines range and sentencing Alvarez to a total of 360 months' imprisonment. The court provided specific reasons to justify its deviation from the Guidelines range, including: (1) a doctor should be punished more severely than other participants because the doctor is breaching a position of trust and an ethical obligation to put the patient's interest first; (2) the crime was not a fleeting moment, but a sustained conspiracy over a period of months; (3) Alvarez followed a lower standard of care with regard to the health of the HIV-positive patients as compared to her prior patients; and (4) there was a need to promote adequate deterrence of Medicare fraud because it was becoming rampant in the Miami area and the risk of getting caught was fairly low. *See United States v. Martin,* 455 F.3d 1227, 1240 (11th Cir. 2006) (finding that deterrence is an especially important element to consider during sentencing for fraud-based crimes because of their thought-out nature).

In addition to those four reasons, the district court added two other significant ones. First, it found that Alvarez had "blatantly lied" during her testimony at trial, Doc. 312:7, referring to her "perjurious

testimony" as a reason to impose a harsh sentence. *See* Doc. 312:93 ("[T]aking into consideration her criminal conduct, her background, the need to deter Medicare fraud, her position as a doctor, as a leader in this criminal enterprise, her perjurious testimony, the combination of all those factors leads me to a sentence above the guidelines."); Doc. 299:1 (Order Denying Emergency Motion to Correct Sentence) ("The variance resulted in a reasonable sentence, because the defendant, as a licensed medical doctor, prescribed to HIV patients medically unnecessary treatment with potential harmful effects on these vulnerable patients. This along with her perjurious testimony during trial, her lack of remorse, and the extent and sophistication of the fraud justified the sentence.").

Second, the court focused on Alvarez's "lack of remorse," which Alvarez did not and could not dispute in light of her unwavering assertions of innocence even after her conviction. Doc. 299:1; *see also* Doc. 312:37 ("THE COURT: . . . We have an individual who has shown no remorse, agreed, because she doesn't think she did anything wrong . . . – true? [Counsel for Alvarez]: True."); Doc. 312:79 (stating that a "big factor" in the sentence imposed was that Alvarez had "no acceptance of responsibility whatsoever" and "[n]o remorse"). It was reasonable for the district court to consider those two factors, which support the differences between her sentence and those of her coconspirators, most of whom accepted responsibility, pleaded guilty, and cooperated.

It is true that Alvarez's 360-month sentence amounted to a significant variance and exceeded the sentences of her coconspirators (some of whom were the undisputed ringleaders of the operation), and that 18 U.S.C. § 3553(a)(6) instructs a district court to take such disparities into account when imposing a sentence. But the court based this difference, in part, on Alvarez's status as a doctor and her leadership role in the offense, a designation that Alvarez does not challenge on appeal. This finding is entitled to due deference.

To be sure, it is troubling that some coconspirators who were more deeply involved in the fraudulent scheme orchestrated by the Benitez brothers received only a fraction of the sentence that Alvarez did. McKenzie received 95 months; Campos, 48 months; Perera and M. Rodriguez, 24 months each. All four of those coconspirators, however, provided the government with substantial assistance, and Campos, Perera, and M. Rodriguez entered guilty pleas. This Court has held that "there is no unwarranted disparity when a cooperating defendant pleads guilty and receives a lesser sentence than a defendant who proceeds to trial." *United States v. Langston,* 590 F.3d 1226, 1237 (11th Cir. 2009); *see also United States v. Docampo,* 573 F.3d 1091, 1101 (11th Cir. 2009); *United States v. Williams,* 526 F.3d 1312, 1323-24 (11th Cir. 2008).

The sentencing disparities in the present case are not unwarranted. In addition to pleading guilty and cooperating with the government, only one of the

apparently comparable coconspirators was, like Alvarez, a medical doctor licensed to practice in the United States. That coconspirator was Alvarez's father, but at sentencing he was 81 years old and suffered from heart disease, impaired lung function requiring use of an oxygen mask, degenerative back disease, and what appeared to be either Alzheimer's or some other form of dementia. Furthermore, the district court relied not only on Alvarez's abuse of trust in her position as a doctor but also focused on the potential harmful effects that her conduct had on her patients. Finally, unlike her, none of Alvarez's coconspirators went to trial, none testified, none committed perjury, and none displayed an utter and total lack of remorse from the beginning through the end of the proceedings.

Although the sentencing disparities are a concern, the district court gave many compelling reasons justifying its departure from the Guidelines, and it is within that court's discretion to decide how much weight to give each of the § 3553 factors as long as it has not committed a clear error of judgment. *See United States v. McBride*, 511 F.3d 1293, 1297-98 (11th Cir. 2007) (per curiam); *Irey*, 612 F.3d at 1191 ("A district court's sentence need not be the most appropriate one, it need only be a reasonable one. We may set aside a sentence only if we determine, after giving a full measure of deference to the sentencing judge, that the sentence imposed truly is unreasonable.").

Furthermore, Congress has recently amended the Guidelines to ensure that health care fraud is punished more severely. In health care reform legislation enacted in March 2010, Congress directed the Sentencing Commission to amend U.S.S.G. § 2B1.1 by adding a specific offense enhancement for "a Federal health care offense relating to a Government health care program" that involves $1 million or more. Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, § 10606(a)(2)(C), 124 Stat. 119, 1006-07 (March 23, 2010). If the loss amount is between $1 million and $7 million, 2 levels are added; if it is between $7 million and $20 million, as it was in this case, 3 levels are added; and if it is $20 million or more, 4 levels are added. *Id.* Congress also directed the Sentencing Commission to review the Guidelines and policy statements for health care fraud offenses to ensure that they "reflect the serious harms associated with health care fraud and the need for aggressive and appropriate law enforcement action to prevent such fraud" and to provide "increased penalties for persons convicted of health care fraud offenses in appropriate circumstances." *Id.* § 10606(a)(3)(A).

If the new enhancement had been applicable to Alvarez's sentence, then (holding everything else constant) her total offense level would have been 40 and her guidelines range would have been 292-365 months, or 292-360 with the ceiling imposed by the statutory maximum of 30 years. What that means is if Alvarez committed her crime today, the district court's 30-year sentence would fall within the upper

limit of her guidelines range, and we would fully expect that it was reasonable. *See Rita v. United States,* 551 U.S. 338, 347-48 (2007) (appellate court may presume within-guidelines sentence is reasonable); *United States v. Alfaro-Moncada,* 607 F.3d 720, 735 (11th Cir. 2010) (we ordinarily expect that a sentence within the guidelines is reasonable). That expectation would be reinforced by the district court's findings about the specific circumstances of this case: Alvarez's abuse of her position of trust as a doctor; the ongoing nature of the conspiracy; the lower standard of care Alvarez provided to her HIV-positive patients; the need to deter Medicare fraud, particularly in the Miami area; and Alvarez's perjury at trial and her complete lack of remorse.

Even though the amendment to the guidelines does not apply retroactively to Alvarez, it can still inform our consideration of whether thirty years is a reasonable sentence for her crime, particularly in light of all of the specific reasons the district court provided for varying upward on her sentence. Even under the earlier version of the guidelines, only three more points would have put the top of Alvarez's sentence range at 30 years (offense level 40), and only two more in addition to that would have put the bottom of her sentence range at 30 years (offense level 42).

The district court gave many compelling reasons justifying its departure from the Guidelines, and it is within that court's discretion to decide how much weight to give each of the § 3553 factors. The district

court thoroughly considered the § 3553 factors and offered compelling justifications for its decision that, taken together, justified a sentence above the Guidelines. *See Gall,* 552 U.S. at 51; *Irey,* 612 F.3d at 1187. Giving that decision the deference it is due, we cannot say that Alvarez's sentence is outside the range of reasonable sentences, or that the district court committed a clear error of judgment in imposing it. *See Irey,* 612 F.3d at 1190; *McBride,* 511 F.3d at 1297-98.

B. The polygraph examinations

Alvarez next argues that the district court erred by refusing to consider the exculpatory results of a post-verdict polygraph examination in determining whether to apply an obstruction of justice enhancement. This was error, she argues, because the district court may not "invent a blanket prohibition against considering certain types of evidence at sentencing." *See United States v. Watts,* 519 U.S. 148, 152 (1997). While Mateos tries to couch this claim in the terms of a "refusal to consider" argument, the district court's ruling is better understood as a refusal to give dispositive weight to the results of the third polygraph examination. That is, it was not a blanket prohibition on considering the exams in any case; it was instead a finding that the evidence that Alvarez gave perjured testimony was so overwhelming that no polygraph could sway the district court's decision, especially not a third exam taken after the first two were inconclusive. Given the narrowly worded questions, and the

fact that she only passed the test on her third try, the probative value of the test results was minimal.

There was no error in the district court's refusal to give the polygraph exams dispositive weight when they directly contradicted the jury's verdict. In fact, the district court may have abused its discretion if it had given them any weight at all, insofar as they contradicted the jury's verdict that Alvarez had knowledge of the fraud at St. Jude. *See United States v. Hunt*, 521 F.3d 636, 649 (6th Cir. 2008) (below-Guidelines sentence was substantively unreasonable when based on a district court's doubts that defendant actually had criminal intent, which contradicted the jury's verdict). The district court did not clearly err by disregarding the results of the third polygraph exam and applying an obstruction of justice enhancement based on the evidence presented at trial.

C. The United States as a "victim" under the MVRA

The Mandatory Victims Restitution Act of 1996 requires district courts to impose restitution in certain cases where "an identifiable victim or victims has suffered a physical injury or pecuniary loss." 18 U.S.C. § 3663A(c)(1)(B). The MVRA defines "victim" as:

> [A] person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as

> an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

18 U.S.C. § 3663A(a)(2).

Alvarez argues that the district court was not authorized to order her to pay restitution to the United States government, because the government is not a "victim" or a "person" under the plain terms of the MVRA. While Alvarez is correct that it is somewhat awkward to refer to a government as a person, the surrounding provisions of the MVRA indicate that the term "victim," as used in the MVRA, includes the government.

It is dispositive that the enforcement provisions of the Act explicitly recognize the government as a possible victim. 18 U.S.C. § 3664(i) ("In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution."). "[N]othing indicates that Congress intended two different meanings when it used the same word in §§ 3663A and 3664(i) – related provisions adopted at the same time and codified in serial sections in the United States Code." *United States v. Ekanem,* 383 F.3d 40, 43 (2d Cir. 2004). This provision conclusively resolves any ambiguity in the meaning of the word "victim" in favor of the conclusion that Congress treated the United States government as a potential victim under the MVRA. In reaching this holding, we

are in agreement with each of our sister circuits that has addressed this issue. *See United States v. Senty-Haugen,* 449 F.3d 862, 865 (8th Cir. 2006); *Ekanem,* 383 F.3d at 43; *United States v. Lincoln,* 277 F.3d 1112, 1113 (9th Cir. 2002); *United States v. Martin,* 128 F.3d 1188, 1190 (7th Cir. 1997).

D. The intended loss attributable to Mateos

We now turn to Mateos's claims of sentencing error, both relating to the district court's calculation of her Guidelines range. First, Mateos argues that the district court erroneously found her responsible for the entire intended loss of the conspiracy (more than $9 million), leading to a twenty-level enhancement of her Guidelines range. *See* U.S.S.G. § 2B1.1(b)(1)(K). She argues that the court erred because it failed to make individualized findings of fact as to the specific scope of her involvement in the conspiracy. We disagree.

A "district court may hold participants in a conspiracy responsible for the losses resulting from the reasonably foreseeable acts of co-conspirators in furtherance of the conspiracy." *United States v. Hunter,* 323 F.3d 1314, 1319 (11th Cir. 2003). Under the Guidelines, "to determine a defendant's liability for the acts of others, the district court must first make individualized findings concerning the scope of criminal activity undertaken by a particular defendant." *Id.* at 1319 (citation omitted). Once the court determines the scope of the defendant's involvement

in the conspiracy, it then may consider "all reasonably foreseeable acts and omissions of others in the jointly undertaken criminal activity." *United States v. McCrimmon*, 362 F.3d 725, 731 (11th Cir. 2004) (citation omitted).

Mateos's primary argument against attributing the entire loss to her is that, even if Mateos knew that St. Jude was providing medically unnecessary treatments (as the jury concluded), there was no evidence that she knew St. Jude was billing Medicare for infusions that were not provided at all. That is, she only consented to participating in the scheme insofar as patients were actually injected with unnecessary medicine; not to billing Medicare when no treatment was provided at all. The position defies common sense. The evidence established that Mateos knew that St. Jude was purchasing far less WinRho than it was billing Medicare for, and that was the essence of the fraud. Whether a particular patient was injected with saline, a diluted dose of WinRho, or nothing at all, is irrelevant to the object of the conspiracy: to overbill Medicare.

Because it is reasonably foreseeable that a clinic engaged in fraudulently diluting doses of medicine might also be in the practice of billing Medicare when no treatment was provided whatsoever, the district court did not err in attributing the entire intended loss to Mateos. *See McCrimmon*, 362 F.3d at 731-32 (defendant responsible for losses stemming from all reasonably foreseeable acts of coconspirators).

E. Risk of death or serious injury

Finally, Mateos challenges the district court's two-level enhancement of her Guidelines range based on its finding that her offense involved "conscious or reckless risk of death or serious bodily injury." U.S.S.G. § 2B1.1(b)(13)(A). She argues that there was no evidence supporting the district court's conclusion that she knew or recklessly disregarded the severe risks associated with giving HIV-positive patients the unnecessary treatments prescribed by the doctors at St. Jude.

The district court did not clearly err in finding that a trained nurse, such as Mateos (who also received training as a doctor in Cuba), would be well aware that any injection always carries some risk of infection or other complications, and that the risk is especially high when the patients have HIV and weakened immune systems. *See United States v. Campbell,* 491 F.3d 1306, 1315 (11th Cir. 2007) (reviewing "for clear error the district court's findings of fact regarding whether a defendant should receive an enhanced sentence under the Guidelines" (citation and ellipsis omitted)). Even though there was no evidence that any patient was actually harmed from the treatments, the enhancement was nevertheless appropriate because the Guidelines provision focuses on the defendant's disregard of risk rather than on the result. *See United States v. Snyder,* 291 F.3d 1291, 1294-95 (11th Cir. 2002). The district court did not err in applying the enhancement.

V

For the foregoing reasons, we AFFIRM the district court's judgments.